Supreme Court, U.S.
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90-703

No. _____

In The

Supreme Court of the United States

October Term, 1990

MARTIN MITCHELL STEVENS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF OREGON

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46 pp

QUESTIONS PRESENTED

1. Does a state deny due process to a parent or child if it irrevocably terminates parental rights while denying the parent the ability to be present at the hearing?

2. Is there, under the due process clause of the Fourteenth Amendment, at least a qualified right to be "seen" as well as heard at a hearing affecting fundamental rights?

LIST OF PARTIES IN PROCEEDINGS SOUGHT TO BE REVIEWED

Petitioner Martin Mitchell Stevens, appellant below.

State of Oregon, *ex rel* Juvenile Department of Lane County, Children's Services Division of the State of Oregon, Virginia Jaye Stevens aka Virginia Jaye O'Brien, William James Stevens, and Ronald Joseph Stevens, respondents below.

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No. _____

In The

Supreme Court of the United States

October Term, 1990

MARTIN MITCHELL STEVENS,

Petitioner,

v.

STATE OF OREGON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF OREGON

Petitioner Martin Mitchell Stevens respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Oregon, entered in *State ex rel Juvenile Department of Lane County v. Martin Mitchell Stevens* on July 31, 1990.

JURISDICTION

The opinion of the Court of Appeals of the State of Oregon was filed on February 14, 1990. A petition for review in the Supreme Court of the State of Oregon was denied on May 22, 1990. Pursuant to Oregon law, the

Appellate Judgment was rendered on July 31, 1990. ORAP, Rule 14.05; *Murray Well-Drilling v. Deisch*, 75 Or. App. 1, 704 P.2d 1159, 1162-63 (n.7) (1985). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

OPINIONS BELOW

The order denying review in the Supreme Court of the State of Oregon has not been reported and is reprinted in Appendix A hereto.

The opinion of the Court of Appeals of the State of Oregon, *en banc*, has not been reported. It is reprinted in Appendix B hereto.

The opinion and judgment of the Circuit Court of the State of Oregon, Juvenile Department, has not been reported. It is reprinted in Appendix C hereto.

The Appellate Judgment has not been reported. It is reprinted in Appendix E hereto.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On May 10, 1989, Martin Mitchell Stevens' parental rights were "forever terminated," and his two sons, Ronald Joseph and William James, were "permanently committed to the care, custody and control of the state of Oregon," based on evidence presented by the state in a termination hearing. Judgment Terminating Parental Rights and Order of Permanent Commitment, No. 83-469, Appendix C, *infra*. At the time of the hearing petitioner was temporarily confined in a federal prison at Walla Walla, Washington pursuant to a plea of guilty to having manufactured marijuana.

Under Oregon law, Stevens was entitled to be present at the termination hearing. Further, if Stevens had had the money to pay for his expenses (about $3,000), the United States Marshall would have arranged for his transfer to a local jail so that he could be present throughout the proceedings. Stevens, however, was indigent. Therefore, prior to the termination proceeding, his attorney filed a motion in the trial court requesting the state to cause Stevens to be brought to the hearing at the State's expense, or, in the alternative, to postpone the hearing until petitioner's release from prison.[1] Both motions were denied. Order of March 3, 1989, Appendix D.

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[1] Stevens anticipated being released in the Fall of 1989. The postponement, thus, would have been for approximately 6-9 months.

Stevens, therefore, was precluded from attending or participating meaningfully in the hearing, which lasted seven days. Petitioner's only contact with the court was during his own testimony, given over a speaker phone, after the State had presented its evidence. Stevens' attorney was forced to question the State's witnesses without active consultation with, or assistance from, Stevens during the proceedings. Stevens also, obviously, was deprived of the opportunity to persuade the court of his continuing suitability as a parent by virtue of his demeanor and similar forms of non-verbal communication – a form of "evidence" which is particularly significant in a proceeding addressed to such an intensely personal matter as continuing parental fitness.

Petitioner appealed on the ground, *inter alia*, that the State's refusal to arrange for his presence at the hearing violated his right to due process. The Oregon Court of Appeals heard Stevens' appeal on November 27, 1989. It was thereafter resubmitted *en banc* on January 10, 1990. On February 14, 1990 the trial court's decision was affirmed by a closely divided court. CA A60866 (cases consolidated), Appendix B, *infra*. The Oregon Supreme Court denied his petition for review with two justices dissenting. SC S37006, Appendix A, *infra*. The Oregon Court of Appeals thereafter entered judgment from which this writ is sought on July 31, 1990. Appendix E, *infra*.

REASONS FOR GRANTING THE WRIT

I.

This petition requests the Supreme Court to consider whether there is at least a qualified due process right to be present at a hearing that may irrevocably affect fundamental rights. Stated otherwise, petitioner asks this Court to determine whether there is (in some circumstances at least) a right to be seen as well as heard.

The issue is presented here in the context of a parental termination hearing in which the State of Oregon refused either to transport petitioner to the hearing from a prison where he was temporarily incarcerated or to continue the hearing until his release. The Court has never addressed this particular issue, although it previously has determined that parents have a constitutionally-grounded, fundamental liberty interest in the care and custody of their children. *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Department of Social Servs.*, 452 U.S. 18, *reh'g denied*, 453 U.S. 927 (1981); *Stanley v. Illinois*, 405 U.S. 645 (1972). Indeed, the Court has recognized the importance of the parent-child relationship by noting that when a state undertakes any forced deprivation of parental rights, it "work[s] a unique kind of deprivation." *Lassiter*, 452 U.S. at 27.

The fundamental presumption in favor of maintaining the family unit implicates the interests of both parent and child, *Santosky*, 455 U.S. at 760-61, thus doubling the stakes in this type of proceeding. Permitting the state, in such circumstances, to prevent petitioner from having the opportunity to participate meaningfully in the termination hearing is particularly unfair because the state has –

by definition – concluded that his rights *should* be terminated. It, thus, cannot claim to serve purely neutral values when it stacks the procedural deck against him. Since the State's role as "plaintiff" is antagonistic to the interests of the parent, the need to carefully safeguard procedural fairness in the interests of both parent and child is manifest.

In a parental termination proceeding, the parent is in every real sense a defendant to a state-initiated action seeking to destroy the vital liberty interests embodied in the parent-child relationship. This Court has held that such a threat to constitutional assurances warrants due process protection surpassing that granted to the ordinary civil defendant. *See, e.g., Santosky*, 455 U.S. at 768-70 (clear and convincing standard of proof required in termination hearings). The Court further has recognized the need for great deference when the government brings such an action purportedly on the child's behalf. *Id.* Oregon's failure to provide for petitioner's presence at a hearing brought to terminate his parental rights confounds this Court's direction to exercise particular care when the State chooses to place those rights in jeopardy.

In criminal cases, a basic guarantee under the Sixth Amendment is the accused's right to be present in the courtroom at every stage of his trial. *Illinois v. Allen*, 397 U.S. 337, 338, *reh'g denied*, 398 U.S. 915 (1970); *Lewis v. United States*, 146 U.S. 370 (1892). Confrontation subsumes the right of all litigants to effectively cross-examine witnesses against them. *See, e.g., Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986); *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). Although parental termination hearings are not, strictly speaking, criminal proceedings,

they nonetheless array the authority of the state against the parent and, as noted, involve a potential deprivation at least as profound as in all but the most serious criminal proceedings. *Santosky*, 455 U.S. at 769 ("the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty") (citation omitted). Yet, in the trial eliminating Stevens' rights, not only was petitioner deprived of the right to have his demeanor assessed, he could not effectively consult with or assist his attorney in meeting the government's evidence. Petitioner's counsel could not obtain contemporaneous information from him and was therefore limited in her ability to engage in effective cross-examination. See pp. 12-13, *infra*.

Petitioner submits that in an action implicating vital liberty interests, the prerogative to be present and to be seen by the tribunal charged with adjudication plus the ability to assist one's counsel at trial stand as a constitutional bottom below which due process guarantees are unlikely to be satisfied.

II.

The "right to be seen" for which petitioner argues in this case flows from the confluence of two separate liberty interests: *first*, the interest of parents and their children in maintaining their familial relationship and, *second*, the general due process interest in procedural fairness. Each of those interests standing alone raises due process concerns sufficiently serious to merit review by this Court. Together we submit that the case for review is commanding.

This Court previously has recognized that parents have an important and protected liberty interest in the care, custody and management of their children. *Santosky*, 455 U.S. at 753; *Lassiter*, 452 U.S. at 27. While those rights, of course, may be forfeited through neglect or misconduct, such an interference by the state is not lightly permitted since it demonstratably "work[s] a unique kind of deprivation" (*Lassiter*, 452 U.S. at 27) both to the parent and to the child. Thus, this Court has held not only that parental termination proceedings "must be accomplished by procedures meeting the requisites of . . . Due Process" (*Santosky*, 455 U.S. at 753), but has given content to that determination by recognizing a qualified right to counsel (*Lassiter*) and by requiring proof of parental unfitness by "clear and convincing evidence" (*Santosky*, 455 U.S. at 756).[2]

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[2] The Court also has held that the proper framework for analyzing due process claims in parental termination cases is the three part test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). Under *Mathews*, courts must balance three distinct factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Santosky*, 455 U.S. at 754. *Santosky* already has established that "[i]n parental rights termination proceedings the private interest affected is commanding" (*Id.* at 758) and that "[g]iven the weight of the private interests at stake, the social cost of even occasional error is sizable." (*Id.* at 764).

As for the remaining factor, petitioner submits that the counterveiling state interest here is slight. We take it as beyond dispute that a state would violate due process if it prohibited parents, as a general matter, from attending parental termination hearings. Further, if petitioner in this case had been able to

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There is, in addition, an independent interest in assuring a right of personal presence and participation in judicial proceedings as an important aspect of our adversarial judicial system. That right is implicated without regard to the nature of the specific proceeding, although its strength may depend upon the context in which it is sought to be invoked. Thus, in criminal cases the right flows specifically from the confrontation clause of the Sixth Amendment, and is all but absolute. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988); *Maryland v. Craig*, ___ U.S. ___, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990).[3]

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afford to pay his own expenses, the state would have brought him to the hearing. Thus, this is not a case, such as *Wolff v. McDonnell*, 418 U.S. 539 (1974), in which the state asserts counterveiling penological concerns as a basis for restricting a prisoner's due process rights. *See* 418 U.S. at 556. (Recognizing that in prisoner rights cases there must be "a mutual accommodation between institutional needs and [the Constitution]"). *See also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). Rather, the only state interest asserted is the $3,000 it would have cost to let petitioner preserve his right to appear at a hearing in which his rights ever again to be a father to his children (and his children's rights to continue their legal and psychological ties to their father) were at stake. That balance would scarcely seem to tip in the state's favor. *See, e.g., Little v. Streater*, 452 U.S. 1 (1981). (State's interest in avoiding cost of blood grouping test for indigent defendant in paternity suit insufficient in light of important interests at stake).

[3] "Although the face-to-face confrontation requirement of the clause is not absolute, that does not mean that the requirement may easily be dispensed with . . . [A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where (1) denial of such confrontation is necessary to further an important public policy, and (2) the reliability of the testimony is otherwise assured." *Maryland v. Craig*, 111 L. Ed. 2d at 670.

Apart from the specific right of confrontation, courts repeatedly have acknowledged the importance of demeanor in arriving at informed and correct decisions. That concept finds repeated expression in civil as well as criminal actions. For example, Rule 52 of the Federal Rules of Civil Procedure provides that findings of fact may not be set aside unless "clearly erroneous" after giving "due regard" to the trial court's opportunity "to judge the credibility of the witnesses." In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), the Court elaborated on the importance of this point as follows:

> When findings are based on determinations regarding the credibility of witnesses [as opposed to documentary evidence], Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.

470 U.S. at 575.

The ability of a trier of fact to judge the moral "worth" of a person and to predict his or her future conduct demands an intuitive evaluation that cannot adequately be based on mere words.[4] For example, in the

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[4] That is particularly true in the awkward circumstances of this type of case. The Court has noted that parents involved in termination proceedings "are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation" (*Lassiter*, 452 U.S. at 30). Requiring petitioner to testify by speaker phone exacerbates the problems such a parent might have testifying and defending in such an

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similarly intuitive context of criminal sentencing this Court has noted that the trial judge must base sentencing decisions in part on subjective predictions regarding the convicted defendant's potential, or lack of potential, for rehabilitation. *United States v. Grayson*, 438 U.S. 41, 48 (1978). To that end, the defendant's demeanor and behavior in court are likely to be important indicators of the defendant's rehabilitative potential:

> . . . we have acknowledged that a sentencing authority may legitimately consider the evidence heard during trial, as well as the demeanor of the accused. . . . More to the point presented in this case, one serious study has concluded that the trial judge's "opportunity to observe the defendant, particularly if he chose to take the stand in his defense, can often provide useful insights into an appropriate disposition."

438 U.S. at 50 (citations omitted). The recognition that personal observation is important is scarcely new. More than a century ago this Court stressed the importance of observing demeanor in being able to pick a fair-minded jury: "[T]he manner of the juror while testifying is often times more indicative of the real character of his opinion than his words." *Wainwright v. Witt*, 469 U.S. 412, 420 (1985) (quoting *Reynolds v. United States*, 98 U.S. 145, 156-57 (1878)).[5]

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action. This further decreases the value of the inherently inferior process granted to petitioner here. While speaker phones may be commonplace to the average judge and lawyer, they are utterly alien to people such as petitioner.

[5] In *California v. Green*, 399 U.S. 149 (1970), *cert. dismissed*, 404 U.S. 801 (1971), this Court held that the Confrontation

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What is more, the ability of a party to be present throughout a trial to assist his or her counsel in examining and cross-examining witnesses also is self-evidently important.[6] *See Geders v. United States*, 425 U.S. 80 (1976) (recognizing Constitutional right of criminal defendant to access to counsel throughout trial proceedings, including evening recess). Indeed, the very concept of "*assistance* of counsel" implies active involvement by the party being "assisted." Furthermore, recognition that such assistance must be "effective" or "meaningful" means not only that counsel must possess and utilize the requisite professional skills, but that the conditions necessary to utilizing those skills effectively must be maintained. *See, e.g., Ake v. Oklahoma*, 470 U.S. 68 (1985) (state must provide an indigent defendant with psychiatric assistance to enable counsel to present an insanity defense: a defendant must be given "[m]eaningful access to justice." 470 U.S. at 77); *see also Little v. Streater*, 452 U.S. 1 (under due process clause state must provide indigent defendant with funds

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Clause was not violated by admitting a declarant's out-of-court statements *as long as the declarant testified as a witness at trial and was subject to full cross-examination*. The Court discounted "as a constitutional matter the fact that the jury at trial is foreclosed from viewing the declarant's demeanor when he first made his out-of-court statement. The witness who now relates a different story about the events in question must necessarily assume a position as to the truth value of his prior statement, thus *giving the jury a chance to observe and evaluate his demeanor* as he either disavows or qualifies his earlier statement." *Id.* at 160 (emphasis added).

[6] That is particularly true because of the absence of broad civil-type discovery in parental termination hearings.

to conduct sophisticated blood grouping test necessary to disprove parenthood).

Determining the extent of a party-defendant's right to be present in proceedings affecting fundamental liberty interests is, therefore, a matter which justly commands the attention of this Court. Several lower courts have held that a prisoner has no constitutional right to demand to be brought to court to testify as a plaintiff in a civil damage action under 42 U.S.C. § 1983. *See, e.g., Jones v. Hamelman*, 869 F.2d 1023, 1029-30 (7th Cir. 1985); *Demoran v. Witt*, 781 F.2d 155, 158 (9th Cir. 1985); *but compare Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th Cir. 1982). We submit that those holdings, themselves, invite scrutiny by this Court because of the importance of demeanor evidence and the need to be present to assure effective assistance of counsel. See discussion, *supra*. Yet, even conceding the correctness of those cases, they underscore – rather than undermine – the appropriateness of review here. There is a world of difference between being a plaintiff seeking civil damage redress from government officials, on the one hand, and having the authority of the state invoked *against* an individual in a state-sponsored effort to irrevocably terminate an interest as fundamental as parental rights. This Court ought, at a minimum, to hear this case to consider that distinction and, if appropriate, make it explicit.[7]

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[7] The distinction is all the more critical in light of the fact that, as this Court has correctly observed, parental termination proceedings also plainly implicate the interests of the child (a point entirely overlooked in the decisions below). *See, e.g.,*

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It is important to stress that the right petitioner claims is a limited one.[8] Petitioner does not argue that all indigent parents must be provided the cost of attending termination hearings. If a non-incarcerated parent wishes to maintain custody and control of his or her child it is likely that parent and child will be living in the same household or at least in close physical proximity to each other and to the place of the hearing. Thus, the issue of travel expenses will not arise. Even where that is not the case, so long as a parent is free, he or she can do whatever is needed (walk, hitchhike, etc.) to get to the hearing. It is, thus, the particular combination of indigence plus incarceration that creates the necessity of affirmative state

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Santosky, 455 U.S. at 760 (both "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship"). In fact, in both legal and psychological respects, "[f]or a child, the consequences of termination . . . may well be far reaching" (*id.* at 760 n.11), extending from the simple fact of disruption of the parent-child bond to the loss of rights of succession. Hence, the child's due process interest in "preventing erroneous termination" (*id.* at 760) argues independently for a right to see and be seen. In fact, if the parent's demeanor turns the tide and avoids wrongly severing the critical parental bond, everyone's interests will have been served – even the state's. (*See Lassiter*, 452 U.S. at 27: "Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision"; *Santosky*, 455 U.S. at 766-67: "*Parens patriae* interest favors preservation, not severance of natural familial bonds.") In fact, unlike a parent's right to counsel or imposing a heightened burden of proof on the state, assuring a parent the right to be present at a termination hearing furthers no interest other than the search for an "accurate and just decision."

[8] While the scope of the right may be limited, the need for its recognition plainly is not. A recent study of the incidence of

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intervention to keep this important due process interest from being lost.

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criminal conduct in the adult urban male population in California determined that 25 percent of the overall male population and 51 percent of the black male population had at least one arrest for a serious felony. Tillman, *The Prevalence and Incidence of Arrests Among Adult Males in California* (Bureau of Criminal Statistics Forum, 1988).

While the incidence of criminality is high, there is no inherent connection between the fact of unlawful conduct and parental fitness. *See generally* J. Fassler, "When a Parent Goes to Prison," *Helping Children Cope* (N.Y. Free Press 1978); A. Stanton, *When Mothers Go to Jail* (Lexington Books 1980); C. Hairston & P. Lockett, "Parents in Prison: New Directions for Social Service," 32:2 *Social Work* (Mar./Apr. 1987). Nonetheless, it would belie common sense to suggest that no negative inference arises from a criminal record, let alone contemporary incarceration. That fact increases the need for a parent to marshall all available resources to rebut the negative implications arising from past misconduct. The persuasive power of a favorable personal appearance is, without doubt, among the most important of those resources.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the Court of Appeals of the State of Oregon.

Dated: October 26, 1990

Respectfully submitted,

STEPHEN V. BOMSE*
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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF OREGON

In the Matter of STEVENS, WILLIAM JAMES STEVENS, RONALD JOSEPH STEVENS-JOHNSTON, JAMIE IAN	)	ORDER DENYING REVIEW
State of Oregon, Exrel JUVENILE DEPT OF LANE COUNTY CHILDREN'S SERVICES DIV STEVENS, WILLIAM JAMES Respondents STEVENS, MARTIN MITCHELL	)	CA A60866 SC S37006
STEVENS, VIRGINIA JAYE Aka O'BRIEN, VIRGINIA JAYE STEVENS, RONALD JOSEPH STEVENS-JOHNSTON, JAMIE IAN JOHNSTON, SANDY JOHN Respondents	)	
v.	)	
STEVENS, VIRGINIA JAYE Aka O'BRIEN, VIRGINIA JAYE Respondent STEVENS, MARTIN MITCHELL Petitioner JOHNSTON, SANDY JOHN	)	

The Court has considered the petition for review and ORDERS that it be denied.

DATE: MAY 22, 1990.

/s/ EDWIN J. PETERSON
EDWIN J. PETERSON
CHIEF JUSTICE

Fadeley and Unis, JJ would allow

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APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

In the Matter of William James Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, WILLIAM JAMES STEVENS and MARTIN MITCHELL STEVENS,

Respondents,

v.

VIRGINIA JAYE STEVENS, aka Virginia O'Brien,

Appellant.

In the Matter of William James Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, and VIRGINIA JAYE STEVENS, aka Virginia O'Brien,

Respondents,

v.

MARTIN MITCHELL STEVENS,

Appellant.

In the Matter of Ronald Joseph Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, RONALD JOSEPH STEVENS and MARTIN MITCHELL STEVENS,

Respondents,

v.

VIRGINIA JAYE STEVENS, aka Virginia O'Brien, Appellant.

In the Matter of Ronald Joseph Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, and VIRGINIA JAYE STEVENS, aka Virginia O'Brien, Respondents,

v.

MARTIN MITCHELL STEVENS, Appellant.

In the Matter of Jamie Ian Stevens-Johnston, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, JAMIE IAN STEVENS-JOHNSTON and SANDY JOHN JOHNSTON, Respondents,

v.

VIRGINIA JAYE STEVENS, aka Virginia O'Brien, Appellant.

In the Matter of Jamie Ian Stevens-Johnston, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, JAMIE IAN STEVENS-JOHNSTON and VIRGINIA JAYE STEVENS, aka

Virginia O'Brien, Respondents,

v.

SANDY JOHN JOHNSTON, Appellant.

(86-655; 83-469; 88-113)
(CA A60866 (control); CA A60893; CA A60894)
(Cases consolidated)

In banc

Appeal from Circuit Court, Lane County.

William A. Beckett, Judge.

Argued and submitted November 27, 1989; resubmitted in banc January 10, 1990.

Susan A. Schmerer, Eugene, argued the cause and filed the brief for appellant Virginia Jaye Stevens.

Diane M. DePaolis, Eugene, argued the cause for appellant Martin Mitchell Stevens. With her on the brief was DePaolis, Evans, Shepard & Vallerand, Eugene.

Katherine M. Blaser, Eugene, argued the cause and filed the brief for appellant Sandy John Johnston.

Michael C. Livingston, Assistant Attorney General, Salem, argued the cause for respondent State of Oregon. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

No appearance for other respondents.

GRABER, J.

Affirmed.

Newman, J., dissenting.

FILED: February 14, 1990.

GRABER, J.

Three parents appeal the trial court's judgment terminating their rights to three children. All of the children have the same mother. We affirm without further discussion on all issues involving the mother and the father of the youngest child. We write only to discuss constitutional arguments that Martin Stevens, the father of the two older children, raises. We affirm the termination of his rights.

At the time of trial, Stevens was in prison in Washington on a federal conviction. Because he was indigent, the court appointed an attorney to represent him in this proceeding. However, it refused to order the state to pay the $2,500 to $3,700 that it would cost to bring him to Eugene and hold him in the Lane County Jail for the duration of the trial. Instead, Stevens testified by telephone. He argues that the court's refusal to pay for his appearance in person violated several state and federal constitutional provisions.

Stevens first asserts that he had a right, under Article I, section 11, of the Oregon Constitution, to receive effective assistance of counsel and to confront the witnesses face to face. He could exercise those rights, he argues, only if he were present. The problem with that argument is that Article I, section 11, applies "[i]n all criminal prosecutions"; a proceeding to terminate parental rights is not a criminal prosecution. It is true, as the Supreme Court has noted, that such a proceeding is "one of the

most drastic actions that state can take against its inhabitants" and that the consequences of denial of counsel "are as serious as they are in most criminal prosecutions." *State v. Jamison*, 251 Or 114, 117-18, 444 P2d 15, 444 P2d 1005 (1968). The importance of a termination proceeding does not, however, make it a criminal prosecution. Article I, section 11, does not grant rights that apply in termination cases.[1]

Next, Stevens claims that the court's action denied him due process of law under the Fourteenth Amendment. To the degree that he bases his claim on the rights that the Due Process Clause incorporates from the Fifth and Sixth Amendments, his argument has the same infirmity as does his claim under Article I, section 11. Those rights apply only in criminal prosecutions. It may be that similar rights are available in termination cases, but, if so, the reason is that fundamental fairness requires them in a particular case or category of cases. In *Lassiter v. Department of Social Services*, 452 US 18, 24-27, 101 S Ct 2153, 68 L Ed 2d 640 (1981), the Supreme Court recognized that a termination case threatens the parent with "a unique kind of deprivation" and that, as a result, the parent has a commanding interest in the justice and accuracy of the decision. The Court held, nevertheless, that fundamental fairness does not require the appointment of counsel for a parent in all termination cases.

In order to determine what due process requires before the government may deprive a person of an important right, the Supreme Court directs us to balance the interests that it identified in *Mathews v. Eldridge*, 424 US 319, 335, 96 S Ct 893, 47 L Ed 2d 18 (1976):

> "[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and *the probable value, if any, of additional or substitute procedural safeguards*; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (Emphasis supplied).

See Lassiter v. Department of Social Services, supra, 452 US at 27. In *Babcock v. Employment Division,* 72 Or App 486, 491, 696 P2d 19 (1985), we applied the criteria of *Mathews* in considering whether a telephone hearing in an unemployment compensation case violated due process. We concluded that it did not. We reasoned that the claimant had an opportunity to cross-examine witnesses, personal appearances would not materially reduce the risk of erroneous decisions, and the Employment Division had a strong interest in telephone hearings as a fair and efficient way to conserve its limited resources.

We reach a similar conclusion in this case. Stevens' interest in his parental rights is undoubtedly great. For that reason, he received significant procedural protections. The state was required to prove the facts supporting its petition by clear and convincing evidence, ORS 419.525(3), at a trial at which Stevens was represented by appointed counsel. Our review of the decision against him is *de novo*. ORS 419.561(4). Stevens testified by telephone[2] and was able to consult with his counsel in the same way. His testimony followed that of the adverse witnesses and responded to it point by point, and his counsel was able to cross-examine the adverse witnesses

meaningfully. Those facts suggest that he was able *effectively* to consult with counsel. Indeed, he does not claim that any specific portion of the trial was affected by his absence or that his inability to consult with counsel in person hampered any specific portion of trial preparation or strategy. In view of the extensive safeguards that Stevens did enjoy, we cannot say that the probable value of his physical presence in assuring an accurate and just decision was great. On the other hand, the only interest that the state asserts is financial. In contrast to *Babcock v. Employment division, supra,* the record does not show that that interest extends beyond this particular case, to an extensive governmental program.

We must balance what would be at best a marginal improvement in the fact finding process against a somewhat less marginal governmental interest. In *In Re Darrow,* 32 Wash App 803, 649 P2d 858 (1982), the Washington Court of Appeals held that it was not a violation of due process for the state to refuse to pay to transport a prisoner from Arizona to Washington for a termination hearing. In that case the prisoner was represented by counsel but did not testify, by telephone or otherwise. We need not decide whether we would agree with the Washington court on identical facts. We do hold, however, that on the facts of this case the trial court did not deny Stevens due process when it refused to require the state to pay for his transfer to Eugene in order to participate in the trial.[3]

The dissent's approach has two flaws. First, it assumes, as a matter of fact, that the trial court's inability to evaluate Stevens' demeanor in person was important here, because "[a] key witness adverse to father was the

child's mother, who did appear in person." ___ Or App ___. (Slip opinion at 2.) Testimony from witnesses, other than mother, during the lengthy trial bore on Stevens' fitness. Most significantly, Stevens admitted many of the key facts about which mother testified, including his participation in the manufacture of methamphetamines, his past abuse of drugs and alcohol, and his long criminal history; most recently, he had pled guilty to a federal charge of manufacturing marijuana. He admitted that the people with whom he was associating before his incarceration were dangerous to him and his family. Moreover, the trial court clearly viewed mother's testimony with caution, as shown by its termination of her parental rights. Even if we, on *de novo* review, accepted Stevens' version where it conflicted with mother's, we would still affirm the trial court's decision. On this record, it is not likely that his absence was in fact critical.

Second, the dissent blurs the distinction between two different considerations: "the private interest that will be affected" by the hearing and "the probable value, if any, of additional * * * safeguards" in the procedure. *Mathews v. Eldridge, supra,* 424 US at 335. The importance of Stevens' interest does not *necessarily* translate into added value for the requested additional procedure. The dissent's emphasis on his interest as the controlling factor causes it to overlook the narrowness of our inquiry. We must decide whether Stevens was afforded a full and fair opportunity to present evidence in his behalf and to rebut evidence offered against him and must decide only whether the *incremental* safeguard of personal appearance is not merely desirable, but constitutionally required. In this case, Stevens received that full and fair opportunity,

and the denial of his request to be brought to the hearing at the state's expense did not deny him due process.

Affirmed.

FOOTNOTES

[1] Stevens also cites Article I, section 10, as a source of the rights that he seeks. He does not explain how the failure to bring him to Eugene denied him a remedy in the due course of law for an injury done to him. *See, e.g., Hale v. Port of Portland*, 308 Or 508, 517-24, 783 P2d 506 (1989). Neither Article I, section 10, nor any other provision of the Oregon Constitution is analogous to the Due Process Clause of the Fourteenth Amendment. *State v. Clark*, 291 Or 231, 235 n 4, 630 P2d 810 (1981).

[2] In *State ex rel Juv. Dept. v. Gates*, 86 Or 631, 740 P2d 217 (1987), *rev den* 305 Or 45 (1988), we held, in a termination case, that taking the testimony of expert witnesses by telephone over the objection of a party violated ORS 45.010 and ORS 45.040. Stevens does not make a statutory challenge to taking his testimony by telephone.

[3] We affirm on the merits of Stevens' appeal.

NEWMAN, J., dissenting.

The majority errs when it holds that due process under the Fourteenth Amendment does not require the state to pay $2,500 to $3,700 to bring father from the Washington State Penitentiary to the Lane County Jail to defend his parental rights in person. The majority quotes the *Mathews v. Eldridge*, 424 US 319, 335, 96 S Ct 893, 47 L Ed 2d 18 (1976), three-part balancing test, ___ Or App at ___ (slip opinion at 3), but misapplies it and reaches a wrong, and fundamentally unfair, result.

As to the privacy interest at stake, father has a fundamental liberty interest as a parent. *Stanley v. Illinois*, 405 US 645, 92 S Ct 1208, 31 L Ed 2d 551 (1972). The majority opinion correctly acknowledges that "[father's] interest in his parental rights is undoubtedly great." ___ Or App at ___. (Slip opinion at 3-4). That fundamental liberty interest was *not* present in *Babock v. Employment Division*, 72 Or App 486, 696 P2d 19 (1985), an unemployment compensation case to which the majority gives so much weight. ___ Or App at ___. (Slip opinion at 3.)

As to the risk of erroneous deprivation of father's parental interest, the majority asserts that "we cannot say that the probable value of [father's] physical presence in assuring an accurate and just decision was great[,]" ___ Or App at ___ (slip opinion at 4), and calls father's presence "at best a marginal improvement in the factfinding process." ___ Or App at ___. (Slip opinion at 4-5.) The

majority's conclusions are wrong. The purpose of a termination proceeding is to determine a person's fitness to continue as a parent. This is one of the most difficult tasks that a court can undertake. As stated by the court, in *State v. Jamison*, 251 Or 114, 117, 444 P2d 1005 (1968):

> "The permanent termination of parental rights is one of the most drastic actions the state can take against its inhabitants."

To minimize the risk of error, the court must be able to determine as accurately as possible what kind of person the parent is. Demeanor has an importance that it does not have in other kinds of proceedings, such as an unemployment compensation hearing.

Because the state did not provide the expenses for father to appear, the court could not evaluate his demeanor. A key witness adverse to father was the child's mother, who did appear in person. Although father admitted certain "key facts about which mother testified," ___ Or App at ___ (slip opinion at 5), he also contradicted her testimony on other "key facts," including her allegations of physical abuse and various criminal charges. Mother's parental rights were also at issue, but that only heightens the need for the court to be able to weigh father's credibility against hers. The majority, therefore, seriously underestimates the probable value of father's presence in court.

The majority asserts that father failed to point to a "specific portion of the trial [that] was affected by his absence[.]" ___ Or App at ___. (Slip opinion at 4.) He does not need to, because his absence affected the entire proceeding. The majority fails to evaluate correctly the

importance to the trial court of observing father when determining his credibility and parental fitness, as well as the importance to father of an opportunity to be at his counsel's side and to face witnesses when they give adverse testimony.

As to the governmental interest, the majority concedes that the state's $2,500 to $3,700 interest is only "financial." ___ Or App at ___. (Slip opinion at 4.) Its interest is weak. Again, this is not an unemployment compensation hearing where, according to the majority, the state has a "strong interest in telephone hearings as a fair and efficient way to conserve its limited resources." ___ Or App at ___. (Slip opinion at 3.)

After identifying and characterizing the three factors that it must balance under *Mathews v. Eldridge, supra*, the majority then strikes an unfair balance. Despite its efforts at the end of the opinion to explain what it has done, ___ Or App at ___ (slip opinion at 6), in actuality it has failed to place on the scale the great weight of father's fundamental interest in his parental rights. Contrary to *Mathews*, the majority weighs *two* factors only – *not three*. As it earlier stated:

> "We must balance what would be at best a marginal improvement in the factfinding process against a somewhat less marginal governmental interest." ___ Or App at ___. (Slip opinion at 4-5.)

I have already emphasized that the majority errs when it evaluates father's presence as only a "marginal improvement in the factfinding process." ___ Or App at ___. (Slip opinion at 4-5.) It is at least of equal importance that the majority has not placed in the balance at all father's

parental interest. If the majority had given that interest proper weight, it could not have reached the result that it did in view of the weak interest of the state.

I dissent.

Joseph, C.J., and Buttler and Rossman, JJ, join in this dissent.

CERTIFICATE OF SERVICE

I hereby certify that on March 21, 1990, I served two true copies of the foregoing Petition for Review of Martin Mitchell Stevens on each of the persons, parties, entities or agencies listed below, by depositing in the United States Post Office at Eugene, Oregon, with postage prepaid thereon, enclosed in a sealed envelope containing the copies addressed, respectively, as follows:

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/s/ Diane M. DePaolis

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APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

JUVENILE DEPARTMENT

In the Matter of RONALD JOSEPH STEVENS, A Child.	)	Case No. 83-469 JUDGMENT TERMINATING PARENTAL RIGHTS AND ORDER OF PERMANENT COMMITMENT

This matter came on for trial on March 14, 1989, before the Honorable William A. Beckett, Circuit Judge; Petitioner Children's Services Division appeared through Cynthia Guiles-Fellez, caseworker, and Stephen R. Blixseth, Assistant Attorney General; Martin Mitchell Stevens appeared through his attorney, Diane DePaolis; Sandy John Johnston appeared in person and through his attorney, Katherine M. Blaser; Virginia Jaye Stevens, aka Virginia Jaye O'Brien, appeared in person and through her attorney, Susan Schmerer; the child appeared through his attorney, William A. Furtick. Trial continued on March 15, 16, 20, 21, 22, 23 and on March 24, the parties rested and made argument. Thereafter, the court rendered its decision from the bench.

The court finds by clear and convincing evidence that it has jurisdiction over the minor child, the subject matter of the action, and the parties. The court further finds that the following allegations of the petition to terminate the parental rights of Martin Mitchell Stevens have been proven by clear and convincing evidence: 1, 2 (except as to father's address), 3, 4a, 4b (except as to controlled

substances), 4d and 4e. Paragraphs 4c and 5b were withdrawn by petitioner at the conclusion of its case. Paragraph 4b as to controlled substances and Paragraphs 5c and 5d were stricken upon father's motion at the conclusion of petitioner's case. 5a was not proven.

The court treats all termination of parental rights cases as among the most serious matters before the court. The court finds, by clear and convincing evidence, if not beyond a reasonable doubt, that Martin Mitchell Stevens is not a fit parent, not solely by reason of his incarceration (he has been unavailable to the children by reason of incarcerations since mid 1986), but because of his whole style of life. The court finds that Mr. Stevens has used illegal substances, associates with criminal elements, and that drugs and drug paraphernalia have been on the premises where the children lived with him. His criminal convictions are the direct result of his lifestyle.

The court believes that Mr. Stevens has been violent towards Virginia Jaye Stevens, aka O'Brien, the mother of the child, and that this violence was committed in front of the children.

Mr. Stevens testified by telephone, pursuant to the agreement of counsel, and his testimony demonstrates that he is still in denial, and that services would be of little avail.

Based on the above, the court concludes that it is in the best interests of the child that Mr. Stevens' parental rights be terminated and the child freed for adoption;

NOW, THEREFORE, IT IS HEREBY ADJUDGED that the parental rights of Martin Mitchell Stevens to the

above-named child shall be, and hereby are, forever terminated, and the child is permanently committed to the care, custody and control of the state of Oregon, Department of Human Resources, Children's Services Division, with authority to consent *in loco parentis* to the adoption of said child, in lieu of the consent of the child's father, whose rights are hereby judicially terminated.

DATED this 10th day of May, 1989.

/s/ William A. Beckett
William A. Beckett
Circuit Judge

APPROVED AS TO FORM:

/s/ Stephen R. Blixseth
Stephen R. Blixseth,
OSB No. 71023
Assistant Attorney General Of Attorneys for Petitioner

/s/ Diane M. DePaolis
Diane M. DePaolis,
OSB No. 76119
Attorney for Father

/s/ William A. Furtick
William A. Furtick,
OSB No. 75125
Attorney for Child

SUBMITTED BY:
Stephen R. Blixseth, OSB No. 71023
Assistant Attorney General
Of Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 1989, I served two true copies of the foregoing Appellant's Opening Brief and Abstract of Record on each of the persons, parties, entities or agencies listed below, by depositing in the

United States Post Office at Eugene, Oregon, with postage prepaid thereon, enclosed in a sealed envelope containing the copies addressed, respectively, as follows:

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APPENDIX D

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF LANE
Juvenile Department

In the Matter of	)	Case No. 83 469
RONALD JOSEPH STEVENS,	)	Case No. 86 655
WILLIAM JAMES STEVENS,	)	
Children.	)	

THIS MATTER having come before the Court on Father's Motion for Approval of Expenses, and Alternative Motion to Sever and Postpone Trial and the court having taken said Motions on the record and now being fully advised,

IT IS HEREBY CONSIDERED AND ORDERED that both Motions are denied.

DATED this 3rd day of March, 1989.

/s/ James R. Hargreaves
JAMES R. HARGREAVES
CIRCUIT JUDGE

APPENDIX E

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

In the Matter of William James Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, WILLIAM JAMES STEVENS and MARTIN MITCHELL STEVENS,

Respondents,

v.

VIRGINIA JAYE STEVENS, aka Virginia O'Brien,

Appellant.

In the Matter of William James Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, and VIRGINIA JAYE STEVENS, aka Virginia O'Brien,

Respondents,

v.

MARTIN MITCHELL STEVENS,

Appellant.

In the Matter of Ronald Joseph Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, RONALD JOSEPH STEVENS and MARTIN MITCHELL STEVENS,

Respondents,

APPELLATE JUDGMENT

v.

VIRGINIA JAYE STEVENS, aka Virginia O'Brien, — Appellant.

In the Matter of Ronald Joseph Stevens, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, and VIRGINIA JAYE STEVENS, aka Virginia O'Brien, — Respondents,

v.

MARTIN MITCHELL STEVENS, — Appellant.

In the Matter of Jamie Ian Stevens-Johnston, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, JAMIE IAN STEVENS-JOHNSTON and SANDY JOHN JOHNSTON, — Respondents,

v.

VIRGINIA JAYE STEVENS, aka Virginia O'Brien, — Appellant.

In the Matter of Jamie Ian Stevens-Johnston, A Child.

STATE ex rel JUVENILE DEPARTMENT OF LANE COUNTY, CHILDREN'S SERVICES DIVISION, JAMIE IAN STEVENS-JOHNSTON and VIRGINIA JAYE STEVENS, aka Virginia O'Brien,

Respondents,

v.

SANDY JOHN JOHNSTON,

Appellant.

(86-655; 83-469; 88-113)
(CA A60866 (control); CA A60893; CA A60894)
(Cases consolidated)

In banc

Appeal from Circuit Court, Lane County.

William A. Beckett, Judge.

Argued and submitted November 27, 1989; resubmitted in banc January 10, 1990.

Susan A. Schmerer, Eugene, argued the cause and filed the brief for appellant Virginia Jaye Stevens.

Diana M. DePaolis, Eugene, argued the cause for appellant Martin Mitchell Stevens. With her on the brief was DePaolis, Evans, Shepard & Vallerand, Eugene.

Katherine M. Blaser, Eugene, argued the cause and filed the brief for appellant Sandy John Johnston.

Michael C. Livingston, Assistant Attorney General, Salem, argued the cause for respondent State of Oregon. With him on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

No appearance for other respondents.

GRABER, J.

Affirmed.

Newman, J., dissenting.

FILED: February 14, 1990.

DESIGNATION OF PREVAILING PARTY AND ALLOWANCE OF COSTS

Case Name: *State ex rel Juvenile Department v. Stevens*

Appellate case number: A60866 (control); 60893 and 60894

Trial Court or agency case number: 86-655; 83-469 and 88-113 (C)

Prevailing party or parties: Respondents in all cases.

[ ] No costs allowed

[ ] Costs allowed to the prevailing party or parties, payable by:

In a criminal, post-conviction relief, habeas corpus, juvenile or other case in which a party may be represented by appointed counsel entitled to compensation under ORS 138.500, if the prevailing party is a private party and represented by retained counsel or appeared *pro se*, the prevailing party is allowed costs.

* * *

FINAL ORDER*

IT IS ORDERED that on appeal or judicial review the prevailing party or parties recover from

costs and disbursements taxed at $ _____, and attorney fees in the amount of $ _____. (ORAP 11.03, 11.05, and 11.10.)

IT IS FURTHER ORDERED that judgment be entered in favor of the Judicial Department and against

in the amount of $ _____, for filing fees not waived and unpaid at the time of entry of the final written disposition of this ___ case. ORS 21.605. ___

Date Supreme Court denied review: MAY 22 1990

DATED: JUL 31 1990 COURT OF APPEALS

(seal)

*This section will be completed when the appellate judgment is prepared. The Records Division of the Office of the State Court Administrator will prepare the appellate judgment, enter it in the appellate register, and mail copies to the parties within the time and in the manner specified in ORAP 11.03(3). *See also* ORS 19.190(1).